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No. 1062

In the Supreme Court of the United States

January Term, 1968

CHARLES COBIA and EVELYN COBIA,
husband and wife,
Petitioners,

v.

THE UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on the 30th day of October, 1967.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals is prinetd in App. A, infra, pp. A1-A3 and is reported in 384 F.2d 711 (1967). The opinion of the United States District Court for the District of Utah is unreported and printed in App. B, *infra,* pp. B1-B-11.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 30, 1967, (App. A, *infra,* pp. A1-A3). The jurisdiction of this court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

Whether an award made under the Federal Employees' Compensation Act to an injured person not an employee within the meaning of the statute and not injured while in the performance of his duty, can thereby deprive the court of jurisdiction in a Federal Tort Claims Act or deny the injured person the right to pursue his remedy under the Federal Tort Claims Act.

Whether receipt of benefits under the Federal Employees' Compensation Act by one not entitled, constitutes an estoppel or choice of procedure to bar recovery under FTCA.

May the defendant invoke the doctrine of estoppel or choice of procedure when it was the defendant's

agents, servants, or employees that informed the petitioner of his right to the benefits under the FECA. (R375).

and where they have suffered no detriment.

STATUTES INVOLVED

28 U. S. C. § 1346.(b) " * * * the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

5 U. S. C. § 8102. (a) "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty * * * "

5 U. S. C. § 8116. (c) " * * * The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or

the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages * * * "

5 U. S. C. § 8128. (b) " * * * The action of the Secretary or his designee in allowing or denying a payment under this subchapter is—(1) final and conclusive for all purposes and with respect to all question of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise."

STATEMENT

The petitioner, CHARLES COBIA, a married man with five minor children, was employed by the United States Air Force at Hill Air Base near Ogden, Utah. He was an hourly employee obligated by the terms of his employment to punch a time clock as he began his work or completed his work on any given day. On the 15th day of January, 1965, at the end of his working day he punched out, left the building in which he performed his labor, proceeded to a public parking lot designated No. 50 which was fenced out from the military reservation, and boarded an automobile then owned and driven by Mr. Verl Udy, and proceeded to leave Hill Air Force Base area and journey to his home. At that same time, the access highway between petitioner's home and the air base was under construction and the United States Air Force allowed their employees to re-enter the military reservation and travel along a road known as "perimeter road"

which emerged from the reservation closer to the town of Ogden without entailing the inconvenience of traveling upon the highway that was then under construction. Any re-entry to the base was strictly for the convenience of the employee.

After re-entering the military reservation, the petitioner and his companions traveled approximately three miles from the parking lot and the building in which the plaintiff worked when an oil tank became uncoupled from a motor vehicle then owned and operated by the defendant, crossed over the center line of the highway and struck the automobile in which the plaintiff was a passenger, killing the driver, Mr. Verl Udy ,and inflicting serious injury on the petitioner. Shortly thereafter, petitioner experienced headaches, dizziness, loss of memory and suffered from hallucinations. He was quite disorganized, illogical, had strange thoughts, would imagine things, would hear voices, and was suffering from a market fear of dying and that voices were telling him that he was going to die. (R 243) Within the first two or three days after his injury, while confined in a local hospital, certain employees of the defendant visited him in the hospital and explained to him his rights and benefits under the Federal Employees' Compensation Act. (R 375) Petitioner delayed making a decision relative to application for benefits but on the 8th day of February, 1965, he made application and benefits were ultimately awarded. Petitioner's mental condition grew progressively worse and before release from the hospital he had received a total of 37 electric shock treatments and 12 insulin shock treatments but did not

respond favorably. At the time he accepted the benefits, he was mentally confused, irresponsible, and had no adequate understanding of the law or his rights under the Compensation Act or under the Federal Tort Claims Act. (R 146)

In May of 1966, petitioner's wife secured legal counsel for her husband, and on June 8, 1966, the petitioner filed a Complaint against the United States of America invoking jurisdiction of the Federal Court under provisions of Title 28, U. S. C., Section 1346 (b).

A substantial portion of the benefits paid to the petitioner were paid directly to the hospitals and doctors who rendered medical treatment on his behalf, having paid to them the approximate sum of $10,000.00.

The trial court found that the petitioner was not in the performance of his duty at the time of his injury and any determination to that effect was without substantial support in the evidence. (R 145) The petitioner had left his duty station, the building in which he performed his labors, the "fenced in" portion of the military reservation, checked out through the guard gate, emerged from the public parking lot, re-entered the military reservation for his own convenience and journeyed some three miles before becoming involved in an accident. (R 140 to 143) The fact that petitioner was still on the premises was the sole factor that induced the award of benefits under FECA. (R 280)

The trial court held the petitioner to be estopped from asserting his claim under the Federal Tort Claims Act upon th grounds that he had accepted the benefits of FECA. The Court of Appeals for the Tenth Circuit

affirmed the trial court's determination that the petitioner had no claim under the FTCA because he had exercised a choice of procedure which denied review by the courts.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below in the instant case is in conflict with applicable decisions of this court. This court has made it abundantly clear in *Johansen v. U.S.*, 343 U. S. 427, 96 L. Ed. 1051, 72 S. Ct. 849, (1952) that where an employee is injured in the performance of his duty his exclusive remedy is under the Federal Employees' Compensation Act and the court said at page 1057,

> "There is no provision in the Compensation Act for an election between compensation and other remedies."

The court below in the instant case denied the petitioner a remedy under the Federal Tort Claims Act on the ground that he had "exercised a choice of procedure which denies review by the courts", 'App. A, p. 3). The implication of the decision below is that petitioner had more than one remedy and since he had made his choice or his election as the case may be he is now precluded from pursuing his action under the Federal Tort Claims Act.

Petitioner believes that the *Johanses* case, *supra*, confers upon employees within the meaning of the act, the benefits of that act and they are in effect "fenced in" but should not be construed to allow persons who

are not employees within the meaning of the act and who receive injury while not in the performance of their duty to claim the benefits of the act, they are in effect "fenced out". Petitioner was not in the performance of his duty at the time of the injury (R 145) and cannot be included. His only remedy therefore is the FTCA.

2. The decision of the court below in the instant case is directly in conflict with *United States v. Muniz*, 374 U. S. 150, 10 L. Ed. 2d 805, 83 S. Ct. 1850, (1963) where the court interpreting the Federal Tort Claims Act objected to judicial determinations which narrowed the remedy provided by Congress under the Federal Tort Claims Act. The court said at page 816,

> "The FTCA provides much needed relief to those suffering injury from the negligence of Government employees. We should not, at the same time the state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress. As we said in *Rayonier Incorporated v. U. S. Supra* (352 U. S. at 320) 'There is no justification for this court to read exemptions into the act beyond those provided by Congress, if the act is to be altered that is the function for the same body that adopted it.' "

The trial court in the instant case found that any determination that the petitioner was injured in the performance of his duty was without substantial support in the evidence, (R 145) and in the companion case to the instant case, *U. S. v. Udy*, 381 F.2d 455, (1967) the Tenth Circuit Court of Appeals in an identical factual situation upheld the lower court's deter-

mination that there was no basis upon which an award could be made under the FECA. Clearly then, the petitioner was not entitled to benefits under FECA and his only remedy was under the Federal Tort Claims Act.

3. The questions presented here are of great importance to the administration of the FECA and the FTCA and will affect literally thousands of employees of the Federal Government. *Johnson vs. U. S., Supra,* reinforces the principle of exclusive remedy under FECA and *U. S. v. Muniz, Supra,* denies narrowing the remedies under the Federal Tort Claims Act. In the instant case the petitioner was not entitled to the benefits under the FECA, but they were granted thereby expanding the coverage of that act to cover persons not entitled to benefits and in conflict with *Muniz, Supra,* narrowing coverage under the Federal Tort claims Act which was petitioner's proper and rightful remedy.

4. The decision of the court below is believed to be erroneous and in conflict with decisions of the Sixth Circuit Court of Appeals in *Solomon v. U. S.,* 276 F.2d 669, (1960) in which the court said at page 675,

> "Election of remedies is a well recognized principle of law, but, in order to be applicable, certain facts must exist, one of which is that there must be a choice, knowingly made, between two inconsistent rights, either of which may be asserted at the will of the chooser. If through a mistake of material fact or of law, alternative remedies are not known to be available, the selection of what later develops to be an improper remedy does not constitute an election which will bar

the party from later asserting the correct remedy which is available to him."

The court cited *Goldstein v. U. S.*, 227 F.2d 1, (1955) decided by the Eighth Circuit Court of Appeals where the court there said,

> "The fact that one, through mistake, attempts to exercise a right to which he is not entitled, does not prevent him from exercising one which he has."

5. The Court of Appeals in the instant case below has sanctioned a departure from the usual course of judicial proceedings where the lower court held that although the petitioner was not entitled to benefits under the FECA by virtue of the fact that he had accepted benefits he was now estopped from asserting his remedy under the Federal Tort Claims Act. Petitioner believes this decision is erroneous and in conflict with decisions of other court of appeals. The Government here seeks the benefit of a determination made under mistake of law and fact. This is in conflict with *Goldstein v. U. S., Supra,* where the taxpayers attempted to take advantage of a mistake of law and fact determined by the commissioners relative to the amount of taxes to be paid. The court refused to invoke the doctrine of estoppel for acts or mistakes of its agents or officers which the law does not authorize or permit and refused to allow the taxpayers to seek a profit from the mistake of the commissioner in their favor. The same principle should apply in the instant case. The mistake of law and fact in granting an award under FECA was made by the Government and they should not be able to profit from said mistake.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD RICHARDS
Counsel for Petitioner

January 24, 1968

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SEPTEMBER TERM - 1967

CHARLES COBIA and EVELYN COBIA, husband and wife,
Appellants,

v.

THE UNITED STATES OF AMERICA,
Appellee.

No. 9276

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

Richard Richards, Ogden, Utah (Firm of Froerer, Horowitz, Parker, Richards, Thornley & Critchlow, Ogden, Utah with him on brief) for appellants.

Robert E. Kopp (Barefoot Sanders, Assistant Attorney General, William T. Thurman, United States Attorney, Morton Hollander and J. F. Bishop, Attorneys, Department of Justice, Washington, D. C. with him on brief) for appellee.

Before PICKETT, HILL and HICKEY, Circuit Judges

HICKEY, Circuit Judge

Charles and Evelyn Cobia, husband and wife, appeal from a judgment in which the United States was given a non-suit in a Federal Tort Claims action.

Recovery is sought under 28 U.S.C. §§1346(b), 2671 *et seq.* for injuries sustained by appellant Charles Cobia in a motor vehicle collision at Hill Air Force Base in which the United States confessed negligence as the proximate cause of the collision. Mr. Cobia made application for and continues to receive compensation for injuries under the Federal Employees Compensation Act, 5 U.S.C. §8101, *et seq.*

The court found that application for and the continued acceptance of compensation under the FECA foreclosed the appellants from recovering under the Federal Tort Claims Act. We agree.

Appellants argue that U. S. v. Udy, No. 9156 July Term, 381 F.2d 455 (10th Cir. 1967) determined that the collision out of which this claim arose was actionable under the Federal Tort Claims Act. It is true the claims grew out of the same collision and this court determined the remedy under the Federal Tort Claims Act was available to Udy; however, Udy did not elect to proceed under the FECA and proceeded only under the Tort Claims Act, thereby giving the court an opportunity to exercise its judgment regarding the remedy.

When application is made for FECA benefits, the determination of coverage is made by the Secretary of Labor or his designee and his finding is final and not subject to judicial review. 5 U.S.C. §§8145, 8128(b). Acceptance of benefits under the FECA is an injured employee's exclusive remedy. 5 U.S.C. §8116(c);

Underwood v. United States, 207 F.2d 862 (10th Cir. 1953); United States v. Browning, 359 F.2d 937 (10th Cir. 1966).

Therefore, we affirm the trial court's determination that the appellants have no claim under the Federal Tort Claims Act because they have exercised a choice of procedure which denies review by the courts.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

CHARLES COBIA and EVELYN COBIA, husband and wife,
Appellants,

v.

THE UNITED STATES OF AMERICA,
Appellee.

No. C 111-65

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come before this Court on the 3rd day of August, 1966, for trial before the Honorable A. Sherman Christensen, United States District Judge, and Richard Richards having appeared as counsel for the plaintiff and H. Ralph Klemm as Assistant United States Attorney having appeared as counsel for the defendant, and both sides having called their witnesses and the Court having heard all of the evidence presented by the parties hereto, the Court now makes the following

FINDINGS OF FACT

1. On January 15, 1965, on the military reservation known as Hill Air Force Base, near Ogden, Utah,

the plaintiff Charles Cobia was a passenger in an automobile that collided with an oil bowser that became disconnected from a truck driven by an employee of the defendant while he was in performance of his duty. Upon stipulation of counsel for the defendant, the Court finds that the defendant was negligent and the negligence referred to herein was the proximate cause of said collision and the resulting injuries to the plaintiffs.

2. The plaintiff Charles Cobia received the following injuries in said accident:

a. Very extensive contusion and ragged laceration of left forehead and left cheek.

b. Multiple small lacerations of left face.

c. Moderately severe concussion of brain.

d. Fractured ribs — left chest.

e. Contusions and sprain of left shoulder.

f. Laceration of superior branch left facial nerve with resultant inability to wrinkle forehead or raise left eyebrown.

g. Shock.

3. The Court finds that the plaintiff Charles Cobia was not in the performance of his duty at the time he sustained his injuries. Said finding is based upon the following:

a. Plaintiff Charles Cobia was employed as an airplane landing gear repairman. Substantially all of his work was to be performed in Building S 264. Landing gears upon which he works are generally contained

in that building. All of the tools necessary for the performance of his duties are contained and maintained in said building.

b. Plaintiff is an hourly employee and required by his employment contract to punch a time clock as he begins his working day and at the end of his working day again punches a time clock as he leaves his duty station. On the date of his injury he had in fact punched the time clock in and his supervisor had signed him out indicating that he had completed his regular duties for that day.

c. Following completion of his duties for the day and punching out, he left the building in which he is normally employed and proceeded to the parking lot to be transported to his home. As he proceeded to the parking lot he checked out through the guard gate in Building T 500 and as he left the building and the guard station he entered upon Parking Lot 50.

d. Parking Lot 50 is a parking facility available to the public generally and it is completely fenced out from the rest of the military reservation and all persons can drive upon said parking lot at will without authorization and without going through a guard or checking station.

e. The driver of the automobile, Mr. Verl Udy, then proceeded to drive the automobile from the public parking lot back onto the military reservation as a matter of convenience for himself, Mr. Cobia, and the other passengers. They were allowed to re-enter the fenced portion of the reservation because they could display a sticker indicating that they were employed

by the United States Government. They then passed through a gate on the east end of Parking Lot 50, reentered the military reservation and proceeded toward their home on perimeter road.

f. Supervision exercised over the plaintiff while he was on perimeter road was authorized by virtue of the fact that he was on the military reservation and the government exercised no greater control over him than they would over any other visitor or guest, the sole reason he was upon the military reservation was for his own convenience. No purpose was served for the employer, the military police in charge of traffic on the reservation or any other person or authority.

g. After the plaintiff had journeyed some three miles from the parking lot into the reservation, he was struck by the government vehicle.

h. Upon examination of the circumstances surrounding the accident, the plaintiff Cobia's immediate supervisor was requested to submit an official report of injury in which he indicated that the plantiff Charles Cobia was not doing his regular work at the time of his injury and was not in the performance of his duty.

4. The injuries heretofore mentioned received by the plaintiff were suffered as a direct result of the collision between the government vehicle and the automobile in which plaintiff was a passenger.

Immediately following the collision plaintiff was transported to the medical dispensary at Hill Air Force Base and later transferred to the Dee Hospital in Ogden, Utah. Within a period of 2 or 3 days Mr. Cobia showed signs of severe mental injury. He was having

hallucinations, imagined voices were talking to him and told him that he was going to die, and was generally very confused. Plaintiff Charles Cobia remained in the hospital for a period of five days, after which he was returned to his home for a short period of time, on the 20th day of January, 1965. Two days thereafter he was again seen by his doctor Wendell J. Thompson and complained of headaches, dizziness, loss of memory, and was transferred to the St. Benedict's Hospital. On the 5th day of March, 1965, Dr. Richard Iverson, a qualified psychiatrist practicing his profession in Ogden, Utah, was assigned to his case and rendered extensive care and treatment. He was confined from the 5th day of March, 1965, to the 28th day of April, 1965, and received extensive psychiatric treatment.

Thereafter he was released to his home where he remained for a period of two days but because of his illness he was returned to the hospital for further care. He remained in the psychiatric ward at the St. Benedict's Hospital for several months. During the period of his confinement he received a total of 37 electric shock treatments and 12 insulin shock treatments but the response was not as favorable as the doctor had hoped. Plaintiff suffered a schizophrenic reaction, undifferentiated type, and while his condition has improved since he has resumed work, there is no assurance that there will not be a worsening of his condition or that his condition so proximately caused by the collision will not require him to interrupt or discontinue his work. He is now working full time and there appears no immediate prospect of him being unable to continue his present work.

5. Subsequent to Mr. Cobia's injury, while he was still confined in the hospital within two or three days after the injury, he was visited by certain employees of the federal government to explain to his his assumed right to benefits under the Workmen's Compensation Act. At that time he indicated that he would make a decision relative to his benefits at a later date. On the 8th day of February, 1965, Mr. Cobia did make application for benefits under the Federal Employees' Compensation Act. His application was favorably acted upon pursuant to the Federal Employees' Compensation Act. The Board, having found that he sustained his injuries in the performance of his duties as an employee of the federal government, paid to him the sum of $342.96 per month during the period of time he was unable to work and in addition to such compensation the federal government paid all of his medical expenses growing out of the accident. The total plaintiff received pursuant to the award of compensation has been to date in excess of $1300.00. There was no evidence presented at the trial to indicate that the plaintiff Cobia was in the performance of his duty at the time of his injury and the award was apparently made solely upon the basis that the injury occurred on the military reservation. In view of the surrounding circumstances of the case it is clear that this particular circumstance did not furnish substantial evidence to support a determination by the Bureau of Employees' Compensation, and that any finding that the plaintiff Cobia was injured in the performance of his duties was without any substantial support in the evidence.

The evidence before the court does not clearly

reveal the circumstances under which the plaintiff submitted his claim to compensation, nor the particular circumstances under which compensation payments were actually received and utilized after the approval of his claim. There is no evidence to indicate with whom he and his wife consulted with reference to the filing of the claim or with reference to the acceptance of benefits, nor is there any evidence to indicate that at any stage either he or his advisors undertook or attempted to terminate the receipt of compensation or refused to accept funds because the claim was not properly allowed by the Bureau, or for any other reason. On the contrary, the record indicates that notwithstanding the commencement of this suit on June 8, 1965, claiming damages under the Federal Tort Claims Act the plaintiff has received and accepted compensation pursuant to the award of the Bureau without protest or objection and has utilized said funds for his own and his family's purposes and that there has never been any attempt to withdraw or abandon his application except that implicit in the fact that he has claimed in the present lawsuit damages under the Federal Tort Claims Act and has maintained during the course of these proceedings that neither his application for compensation, the award of the commission, nor his acceptance of benefits has barred him from recovery herein, the plaintiff indicating a willingness to credit against any amount awarded as damages in this suit the compensation payments and medical expenses heretofore received.

There is evidence to indicate, and the court finds, that at the time the plaintiff Cobia executed his claim for compensation under the Federal Employees' Com-

pensation Act he was mentally confused and irresponsible and had no adequate understanding or comprehension of the law with regard to coverage or concerning possible rights under the Federal Tort Claims Act. But there is no evidence from which the court can find that this condition continued during all of the period in which he was being paid and received compensation and, on the contrary, the preponderance of the evidence indicates that during a substantial part of said period he was reasonably advised and understood that he could not lawfully obtain both employees' compensation under the Federal Employees' Compensation Act and damages under the Tort Claims Act, and that he determined with reasonable awareness of possibilities that he should accept benefits under the Federal Employees' Compensation Act. During the time this determination was being made, the law applicable in this district concerning possibilities and probabilities was not settled, nor were the prospects concerning the plaintiff's ultimate recovery in pursuit of either remedy anything but uncertain. Moreover, what the situation of plaintiff Cobia might be with regard to his health, his ability to regain and maintain employment if the application for compensation should be withdrawn or further payments refused and reliance placed solely upon the Federal Tort Claims Act was a difficult one. At the time the application for compensation was filed the certificate of the attending physician did not necessarily indicate any permanent injuries except with respect to control of facial nerves and definitely did not indicate any permanent impairment of earning ability. Subsequently the psychatrist realized that there were serious mental

implications but the realization they they might result in permament impairment of earning ability, if indeed they do, came progressively over a period of time.

Under conditions as they probably existed at the time a knowing and considered determination was made to accept benefits under the Federal Employees' Compensation Act, it was a difficult and close question of judgment as to whether the plaintiff should attempt to renounce benefits under the Compensation Act and rely exclusively upon the Tort Claims Act, or whether he should continue to accept benefits under the Compensation Act. The continued acceptance of benefits having been established and no reason being suggested in the evidence whereby the plaintiffs could be excused from the consequence of such acceptance, the plaintiffs must be deemed to be estopped in equity and good conscience from now relying upon the Federal Tort Claims Act.

In view of the last mentioned holding, it is unnecessary at this time for the court to determine or speculate upon the damages that might ultimately be suffered by the plaintiffs or either of them, were an award to be made under the Federal Tort Claims Act, except to note that a substantial part of the damages now claimed in this action may never accrue, particularly as they relate to the failure of employment in the immediate or forceseeable future; and that the relationship between the benefits that ultimately may be realized under the award of compensation and the damages that could be awarded at this time, should this have been held a proper action under the Federal Tort Claims Act, does not present such an established disparity as to permit or

justify attempted departure from the controlling effect of the acceptance of benefits under the Compensation Act.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. The defendant was negligent in that one of defendant's employees while acting in the course and scope of his employment negligently and carelessly operated a motor vehicle on the 15th day of January, 1965, and as a result of the negligence of said defendant an oil tanker coupled with said automobile came loose causing it to strike the automobile in which plaintiff Charles Cobia was a passenger.

2. That the negligence of the defendant was the sole and proximate cause of the injuries to the plaintiff Charles Cobia, and that there was and is no substantial evidence that the injuries were sustained in the performance of duty for the United States.

3. That as a proximate result of the negligence of the defendant and resulting accident, the plaintiff Charles Cobia has been caused to suffer permanent scarring of his face, pain, suffering and inconvenience, mental disability, some impairment of memory and other injuries which it is unnecessary here to evaluate in view of the awarded compensation.

4. That plaintiff Charles Cobia by the acceptance of benefits under the Compensation Act following his filing of an application before the Bureau of Em-

ployee's Compensation is estopped now to assert that such award and its continued recognition is not his exclusive remedy, and that the defendant having defeated plaintiffs' claims under the Tort Claims Act by reason of such payment and acceptance of benefits, is estopped from questioning plaintiff's entitlement to compensation pursuant to the Federal Employees' Compensation Act for the results of said injuries.

5. That plaintiff Evelyn Cobia has no claim under the Federal Tort Claims Act against the United States, nor has the plaintiff Charles Cobia.

6. That the defendant is entitled to a judgment herein of no cause of action, no costs to be awarded, without prejudice to the plaintiffs' continuing rights under the Federal Employees' Compensation Act. The Clerk will enter judgment accordingly.

Dated this 13th day of September, 1966.

/s/ A. Sherman Christensen
UNITED STATES DISTRICT JUDGE

LIBRARY
SUPREME COURT, U. S.

FILED
FEB 29 1968

No. 1062

In the Supreme Court of the United States

OCTOBER TERM, 1967

CHARLES COSTA AND EVELYN COSTA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1062

CHARLES COBIA AND EVELYN COBIA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner Charles Cobia is a federal civilian employee who applied for and was awarded workmen's compensation benefits under the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*,[1] for personal injuries sustained by him on the premises of an Air Force installation where he worked. He then filed the present action against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), seeking recovery of damages for the same injuries.

[1] Formerly 5 U.S.C. 751 *et seq.*

The injuries were sustained by petitioner Charles Cobia [2] when the automobile in which he was riding collided with a government vehicle on the premises of the Hill Air Force Base, where Mr. Cobia was employed. At the time petitioner was on his way home from work. He and the driver of the car, another base employee, Verl N. Udy, had left the parking lot on the base and were travelling along a road in a restricted area of the base when the accident occurred, about three miles from the building where they worked.

On February 8, 1965, some three weeks after the accident, Mr. Cobia filed a claim for compensation under the Federal Employees' Compensation Act (FECA). The Department of Labor, the agency responsible for administering the FECA, applying the traditional "premises rule," found that he had been injured "while in the performance of his duty" and awarded FECA benefits to him for the period beginning January 18, 1965 (R. 268). Thereafter, Cobia filed the present action, seeking to recover damages from the government for the same injuries under the Federal Tort Claims Act (R. 1–3). Meanwhile, he continued to receive compensation benefit payments under FECA, which as of the time of trial totaled $13,029.90 (R. 270–271).

The district court (Pet. App. B–1—B–11) determined that "in equity and good conscience" Cobia's acceptance of FECA benefits precludes the suit under

[2] Petitioner Evelyn Cobia is the wife of the injured employee. Where injuries to a federal employee are covered by FECA, his wife cannot maintain a separate tort suit for loss of consortium. *Posegate* v. *United States*, 288 F. 2d 11 (C.A. 9), certiorari denied, 368 U.S. 832.

the Federal Tort Claims Act (Pet. App. B–9), and entered a judgment in the government's favor "without prejudice to the plaintiffs' continuing rights under the Federal Employees' Compensation Act." The Court of Appeals for the Tenth Circuit affirmed (Pet. App. A–1—A–3).

2. The FECA expressly provides that the liability of the government under that Act "with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States * * * to the employee." 5 U.S.C. 8116(c). This explicit provision reflects the well settled policy that "compensation laws are practically always thought of as substitutes for, not supplements to, common-law tort actions." *United States* v. *Demko,* 385 U.S. 149, 151. While the district court found that Cobia was "confused and irresponsible" (Pet. App. B–8) at the time he executed his FECA claim, it concluded that this condition did not pervade all of his subsequent activities, and that, in particular, during the periods when he received and accepted FECA benefit checks he was reasonably advised and understood that he was not entitled to these benefits if he also insisted that his proper remedy was under the Tort Claims Act (*ibid.*). Nevertheless, throughout the entire course of events following the Labor Department's determination that his injuries were covered by FECA he continued to accept payment of these benefits and made no attempt to withdraw or cancel his application for them. It was within the sound discretion of the lower courts to find therefore, as they did (Pet. App. A–2; B–9), that there were no compelling reasons to permit Cobia to repu-

diate the administrative process, the fruits of which he had been freely and voluntarily accepting.

3. Moreover, this case does not properly pose the question sought to be raised, namely, whether a compensation award of FECA benefits to an employee not injured in the performance of his duty precludes a Tort Claims Act suit (Pet. 2). The Federal Employees' Compensation Act provides that the government shall pay compensation "for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty". 5 U.S.C. 8102 (a). The FECA then provides that the action of the Secretary of Labor "in allowing or denying a payment" under FECA is "final and conclusive for all purposes and with respect to all questions of law and fact; and * * * not subject to review * * * by a court by mandamus or otherwise". 5 U.S.C. 8128(b); see also 5 U.S.C. 8145. In this case, Cobia submitted a claim for FECA benefits and the Department of Labor, applying a generally recognized standard that an injury to an employee while coming to or leaving work is within the performance of his duties if it occurs on the employer's "premises," found that Cobia was in the performance of his duties at the time he was injured. See 1 Larson, *Workmen's Compensation Law,* § 15.11 (1966). Under Section 8128(b) of the FECA this determination was final and conclusive, and not subject to the district court's review for "substantial support in the evidence" (Pet. App. B–6).

4. In this context, also, it is clear that there is no conflict between the instant denial of a tort claim

remedy to Cobia and the earlier determinations by the district court and court of appeals below in another case that the driver of the car in which Cobia was riding could maintain such a suit. See *United States* v. *Udy*, 381 F. 2d 455 (C.A. 10). In *Udy* the courts confined their attention to whether or not the factual circumstances precluded the tort claim when "no proper administrative determination is interwoven with the tort claim". 381 F. 2d at 456.[3] In the absence of a determination one way or the other by the Department of Labor, the courts there found as an original matter that there was no substantial question of coverage by FECA and allowed the suit. But in this case, on the contrary, an FECA claim was submitted to the administrative agency charged with resolving questions of coverage and that agency found, in the exercise of its "conclusive" authority, that Cobia's injuries were covered by the federal compensation act.[4]

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[3] In *Udy*, the Department of Labor had rendered a decision to award benefits to Mrs. Udy, but the district court there found "that any application made by Mrs. Elizabeth J. Udy for Federal Employees' Compensation Act benefits was effectively withdrawn, abandoned and rejected prior to the time of an award by the Federal Employees' Compensation Board."

[4] *United States* v. *Muniz*, 374 U.S. 150, cited by petitioners, plainly is inapposite. The issue there concerned the right of a federal prisoner to sue under the Federal Tort Claims Act, and no question of coverage under a compensation statute was involved. See *United States* v. *Demko*, 385 U.S. 149, 153–154. Nor does *Solomon* v. *United States*, 276 F. 2d 669 (C.A. 6) create a conflict of decisions. The *Solomon* case was in no way concerned with the question here involved, *i.e.* does an exclusivity provision in a workmen's compensation law bar suit against the employer for tort damages for the same injuries for which the employee has been awarded workmen's compensation benefits.

For the reasons indicated, this tort suit was properly held to be barred.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1968.

U. S. GOVERNMENT PRINTING OFFICE: 1968